

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WSG 35

Date Signed: February 23, 1988

Note to: PWS Enforcement Coordinators

RE: Procedures for Issuing Complaints for Penalties for Violations of PWS Administrative Orders

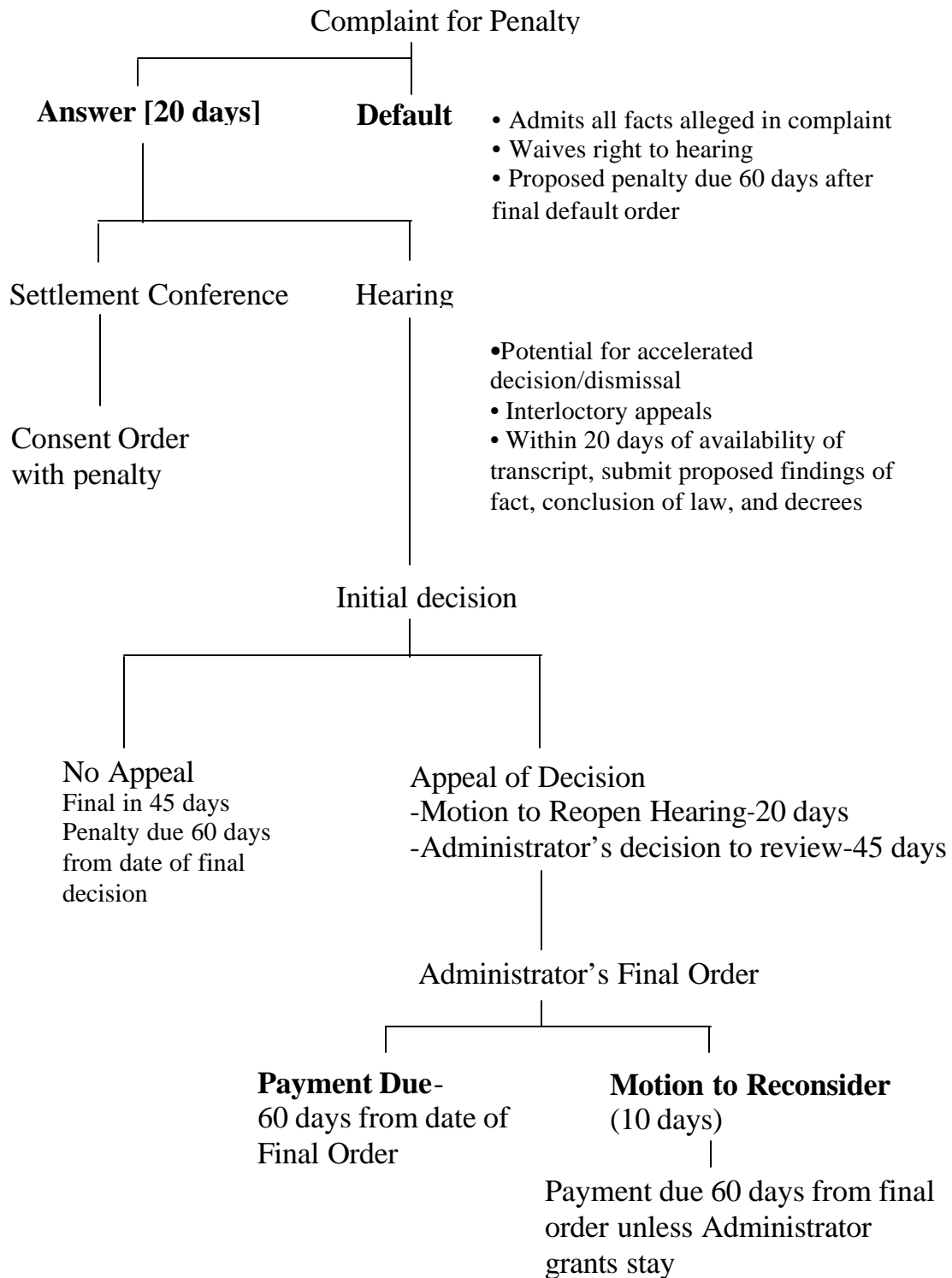
As promised in last week's compliance and enforcement conference call, attached is a summary of the procedures which must be followed in issuing complaints for penalties for violations of PWS administrative orders. The complete procedures are contained in 40 CFR Part 22, Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits.

We suggest that you become familiar with these procedures so that when it becomes time to issue complaints for penalties you are aware of the steps which must be followed. If you do not have a copy of 40 CFR Part 22, please call and we will get you a copy.

We plan to discuss these procedures at the March conference call; however if you have any questions on the rules or the summary, please call me on FTS 382-2303.

Betsy Devlin
(Signed by Betsy Devlin)

Administrative Order Violated or Ignored



PROCEDURES--COMPLAINTS FOR PENALTIES

When respondent violates or refuses to comply with a PWS administrative order, respondent may be liable for an administratively assessed penalty of up to \$5,000 (or a court assessed penalty of up to \$25,000 per day of violation).

The following outlines the procedures which should be followed in issuing complaints for penalties for violation of PWS administrative orders. Additional details are contained in 40 CFR Part 22 (Consolidated Rules of Practice). Please note that these procedures cover administratively assessed penalties only.

A. Issue Complaint

1. When respondent has violated a PWS administrative order, EPA drafts a complaint for penalty and the appropriate cover letters following the models contained in the AO Issuance Guidance.
2. The original and one copy of the complaint are filed with the Regional Hearing Officer; a copy of the signed original is served on respondent. Service is either personal or by certified mail, return receipt requested. Service by mail is considered complete when the receipt is signed.
3. Respondent has a right to request a hearing on any material fact in the complaint or on the appropriateness of the penalty. The request for a hearing must be in writing and filed with the Regional Hearing Officer within 20 days of receipt of the complaint.

B. Respondent's Answer

1. Respondent must file an answer to the complaint within 20 days of receipt in order to avoid a default judgement.
2. Answer should admit, deny, or explain each factual allegation in the complaint. The answer should also state the grounds for any defense, any facts at issue, and whether or not respondent is requesting a hearing. If respondent neither admits, denies, or explains an allegation, respondent is deemed to have admitted it.

C. Hearing

1. A hearing shall be held upon request by respondent of if the Presiding Officer, in his discretion, believes issues were raised in the answer such that a hearing would be appropriate.
2. The Presiding Officer will set a date for the hearing and will inform all parties. Notice of the hearing will be given not less than 20 days before the hearing is scheduled. A hearing will be postponed only if good cause is shown.
3. The hearing shall be held either in the county where the respondent resides or conducts business, in the city where the EPA Regional Office is located, or in Washington, D.C.
4. At the hearing, the Presiding Officer will generally admit all evidence not irrelevant, immaterial, repetitious, or unreliable except any settlement information (excluded under the Federal Rules of Evidence). Witnesses may be examined and cross examined; Presiding Officer may insert into the record a statement of fact or opinion prepared by a witness and may admit affidavits of witnesses who are unavailable to testify.
5. The hearing should be transcribed verbatim. The Hearing Clerk will notify all parties of the availability of the transcript and will furnish all parties with copies (parties are responsible for paying the costs of duplicating additional transcripts).
6. Within 20 days of being notified of the availability of the transcript, any party may submit proposed findings of fact, conclusions of law, and a proposed order. Briefs supporting these must also be submitted. The Presiding Officer sets the deadline for submitting reply briefs.

D. Informal Settlement Conference

1. Respondent may also request a settlement conference with EPA. (The Agency does encourage this). Such a request, however, does not change the requirement to file a timely answer to the complaint.
2. If a settlement conference is held, a consent agreement and order are drafted. These should admit jurisdiction, admit the factual allegations (or neither admit nor deny them), and consent to the proposed penalty. These documents, if agreed to, will be signed by all parties and the case is ended.

E. Default

1. If any party:
 - ! fails to file an answer to the complaint;
 - ! fails to comply with a prehearing or a hearing order; or
 - ! fails to appear at a hearing or a conference without good cause,

then a default judgement may be entered (after appropriate motions are filed or in circumstances 2 & 3 at the discretion of the Presiding Officer). Note that a default judgement may not be entered against respondent for failure to appear at a hearing or conference unless EPA presents sufficient evidence to establish a prima facie case against respondent.

2. If one of the above circumstances occurs, the non-defaulting party drafts a proposed default order. This is served on all parties and the party in default has 20 days to reply.
3. A default is an admission of all facts alleged in the complaint and a waiver of a right to a hearing. If the complaint was for penalty, then the penalty proposed becomes due and payable 60 days after the final default order.
4. If EPA defaults, then the complaint is dismissed with prejudice (i.e., the same complaint cannot be brought again).

F. Initial Decision

1. Presiding Officer files his initial decision as soon as practicable with the Regional Hearing Officer. Copies are sent to all parties. This decision includes findings of fact, conclusions on all issues of law or discretion, and a recommended penalty amount.
2. This decision becomes final within 45 days unless it is appealed to the Administrator or the Administrator decides on his own to review the decision.
3. Parties may move to reopen a hearing to take further evidence. This motion must be made no later than 20 days after service of the initial decision and must state the specific grounds on which relief is sought, state the nature of the evidence, show that the evidence is not cumulative, and show good cause why this was not presented at the hearing. Presiding Officer rules on this within 10 days.

G. Appeals

1. Interlocutory appeals:

- (a) As a matter of right, a party may appeal only from a default order, an accelerated decision or a decision to dismiss, or from an initial decision after an evidentiary ruling. (An accelerated decision can be made at any time by the Presiding Officer if there is no genuine issue of material fact and if a party is entitled to judgement as a matter of law). The Presiding Office may make a decision to dismiss when the complainant has failed to make a prima facie case or cannot show he has a right to the relief requested.
- (b) All others, must be upon motion by the appropriate party and certified by the Presiding Officer to the Administrator. If the Presiding Officer declines to certify an issue to the Administrator, then this decision can be reviewed only on review of the initial decision (unless the Administrator determines that to delay review would not be in the public interest.)
- (c) The Presiding Officer in extraordinary circumstances may stay the proceedings pending the outcome of an interlocutory appeal.

2. Appeals from Initial Decision:

- (a) Any party may appeal any adverse ruling by filing a notice of appeal and an accompanying appellate brief with the Hearing Clerk and on all other parties within 20 days after the initial decision is served on all parties.
- (b) Within 15 days, reply briefs must be filed.
- (c) The Administrator may review an initial decision. If he decides to do so, the Hearing Clerk serves notice on all parties within 45 days of the initial decision.
- (d) The appeal of the initial decision is limited to issues raised by the parties during the proceedings.

H. Final Order

- 1. Administrator shall issue a decision as soon practicable after filing of briefs or oral arguments. Administrator shall adopt, modify, or set

aside the findings and conclusions of initial decision. Administrator may increase or decrease the penalty amount (except in a review of a default order; he may not increase the penalty.)

2. Motion to reconsider the final order must be filed within 10 days. This does not stay the effective date of the final order unless specifically so ordered by the Administrator.

I. Payment of Civil Penalty

Respondent shall pay any penalty within 60 days of date of final order.